92-390

NO. _____

Supreme Court, U.S.
FILED
SEP 1 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1992 TERM

EUGENE BROWN,SR. AND ELIZABETH BROWN,
Petitioners,

v.

CITY OF BALDWIN CITY, KANSAS,
a Municipal Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF KANSAS

Theodore J. Lickteig
Counsel for Petitioners
16 East 13th Street
Lawrence, KS 66044
913-842-6401

I. QUESTION PRESENTED FOR REVIEW.

1. Does Chapter 8, Article 5 of the Code of the City of Baldwin City, Kansas violate the prohibition of the Takings Clause of the Fifth and Fourteenth Amendments to the United States Constitution by over-regulating private property on its face and as applied to the Petitioners?

II. All parties in this proceeding are named in the caption of this case.

III. Table of Contents and Table of Authorities.

I. Question Presented i
II. Parties ii
III. Table of Contents and Table of Authorities ii
IV. Opinions Below iii
V. Jurisdictioal Statement iii
VI. Constitutional Provisions and Ordinances iii
VII. Statement of Case 1
A. Facts 1
B. Stage where Federal Question Raised 2
VIII. Argument 2
IX. Conclusion 5

Appendix A Through Appendix E

Cases

Lucas V. South Carolina Coastal Council
__U.S.__, 112 S. Ct. 2886, __ L. Ed. 2d __ (1992) ... 2,3,4,5

Loretto v. Teleprompter Manhattan CATV Corp.,
458 U.S. 491, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982).....2

Pennsylvania Coal v. Mahon,
260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed.
322 (1992) 3

Board of Regents of State Colleges v. Roth,
408 U.S. 564, 577, 92 S. Ct. 2701, 2709, 23 L. Ed. 2d
548 (1972) 4

IV. Opinions Delivered by Other Courts and Administrative Agencies.

August 27, 1990 --Resolution of Governing Body of the City of Baldwin City, Kansas, number RO8-90-07.

February 27, 1991-- Memorandum Decision of the Douglas County, Kansas District Court, number 90C911.

March 20, 1992-- Memorandum Opinion of the Court of Appeals of the State of Kansas, number 66,474.

June 3, 1992-- Denial of Petition for Review of Appellants, Petitioners herein, by Supreme Court of the State of Kansas, number 91-66474-AS.

V. Statement of Jurisdiction.

1. Date of entry of judgement or decree sought to be reviewed: June 3, 1992.

2.Date of rehearing and order granting extension of time: None.

3.Cross-petition for writ of certiorari: Not applicable.

4.Statutory provision believed to confer jurisdiction: 28 United States Code § 1257(a).

VI. Constitutional Provisions and Ordinances Involved.

Fifth Amendment to the Constitution of the United States (Takings Clause): ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the Constitution of the Untied States, Section 1 (Application of the Fifth Amendment to the States):". . . nor shall any State deprive any person of of life, liberty, or property without due process of law: . . . "

Chapter 8, Article 5, Code of the City of Baldwin City, Kansas (See Appendix A)

VII. Statement of the Case

A. Facts

The Petitioners, Eugene Brown, Sr. and Elizabeth Brown own a house at 319 E. 11th Street in Baldwin City, Kansas. The Browns purchased the house for $6,005.00 in October of 1986. They bought the real estate as investment property. Elizabeth Brown has managed real estate, including rehabilitating and remodeling houses for rent or resale, for more than forty years.

The City of Baldwin City has given itself the power, under City Code 8-509, to remove and demolish houses found to be unfit under circumstances specified in other sections of the Code.

The house sat vacant until the Browns started cleaning up and repairing the house in the spring of 1990. Shortly thereafter, the City, through its employee. Linda Clark, City Clerk, sent a letter to the Browns that said a report had been filed claiming that the house was dangerous, unsafe or unfit for human habitation. The Browns did not receive further information about the report.

On May 18, 1990, the City's governing body decided that the Browns would be given 30 days in which to state whether they intended to demolish and remove the house or repair it to conform to existing building code requirements.

On July 19, 1990, the City, through its employee, Allen J. Craig, Public Officer/Fire Chief, conducted an inspection of the house. The Browns received a written copy of the report the same day. This was the first communication from the City to the Browns of specific alleged deficiencies in the house.

On July 24, 1990, the City, through its employee Rick Shain, City Administrator, sent a letter to the Browns informing them that the City had ordered the house condemned and demolished by August 27, 1990.

The Browns indicated their intent to repair the house as was their right under the Code of the City of Baldwin City. On August

20, 1990, the Browns obtained an estimate of repair for the house from William Lovelace, a construction contractor. On August 24, 1990 the Browns obtained an estimate from a second contractor. Sheet Brothers, in the amount of $1,075.00. The City rejected these estimates of repair and denied the Browns consent to repair the house. On August 27,1990, the governing body of the City passed a resolution finding the house unfit for habitation and ordered it to be demolished and removed within 30 days.

On July 16,1992, the City demolished the house.

B. Stages at which Federal Question Raised

The Petitioners first raised the federal question in this case at the trial level in Douglas County, Kansas District Court. The Court rejected the Petitioners' Takings Clause argument on pages 1 and 2 of its Memorandum Decision.

The Petitioners again raised this question on appeal to the Kansas Court of Appeals. The appellate court addressed this argument on pages 7 through 10 of its Memorandum Decision.

The Petitioners again raised the federal question in their Petition for Review of the Kansas Supreme Court. This petition was denied.

VIII. Argument

The Court should grant this petition for Writ of Certiorari because the decision of the Kansas Court of Appeals conflicts with applicable decisions of this Court.

This Court restated general rules for determining the constitutionality of government actions under the Takings Clause of the Fifth Amendment and stated additional guidelines for such cases in *Lucas v. South Carolina Coastal Council*, __ U.S.__, 112 S.Ct. 2886,__ L.Ed. 2d__ (1992) One of the restated rules is that where the government regulation causes a landowner to suffer an "invasion" compensation must be paid no matter what purpose the government offers for the regulation. *id* at __ U.S. at__, 112 S. Ct. at 2893. (Citing *Loretto v. Teleprompter Manhattan CATV Corp.*,

458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 [1982]) The Code of the City of Baldwin City violates this rule on its face and as applied to the Petitioners. In City Code 8-509(b), the City gives itself the authority to remove or demolish a structure found to be unfit. The City has similar authority under City Code 8-512. As 8-509(b) was applied to the Petitioners, the city has demolished the Petitioners, house with a bulldozer under contract labor. Although the fact of this destruction is not on the record below, the Respondent should be willing to stipulate to this fact. Although the invasion by the bulldozer and bulldozer operator is not permanent, the effect of the invasion is permanent. Where once there was a house, there is now only a remnant of one.

The Memorandum Opinion of the Kansas Court of Appeals makes the following statement in ruling on the Petitioners' Takings Clause argument:

> The city's exercise of its police powers is concerned here, not eminent domain. "Constitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of the police power." *Busch v. City Augusta*, 9 Kan. App.2d 119, 127, 674 P.2d 1054 (1983) (citing 29A C.J.S. Eminent Domain § 6, p.178)

This statement of Kansas case law is clearly in conflict with decisions of this court, most particularly the following fundamental observation from *Lucas*: If, instead, the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappeared."Id at __ U.S. __, 112 S, Ct. 2892-2893 (citing *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L.Ed. 322 (1922)

The case of *City of Marysville v. Standard Oil Co*. 279 U.S. 582, 49 S.Ct. 430,73 L.Ed 856 (1928) was cited in support of the holding in *Bush*, supra, which was in turn cited to support the Memorandum Decision of the Kansas Court of Appeals. That case

is not applicable to the case at bar because in that case there was no invasion by the government on the private property involved. If destruction of a house is not an "invasion," Atlanta was never leveled in the Civil War.

Should this Court view the ordinance and demolition of the house as not being an invasion, then the Petitioners contend the City's actions contravene the Court's rules and rationale under an essentially ad hoc, factual analysis.

"In light of our traditional resort to 'existing rules or understandings that stem from an independent source such as state law' to define the range of interests that qualify for protection as 'property' under the Fifth and Fourteenth Amendments, *Lucas*, supra, at S.Ct. 2901 (quoting *Board of Regents of State College v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 23 L.Ed. 2d 548 [1972]), the Browns are entitled to compensation for the destruction of their house. This so because in adopting and applying the ordinances in question the City has effectively taken a negative easement in the Browns' property, which they hold in fee simple absolute, without paying compensation for it.

Kansas law would normally require the City to invoke its powers of eminent domain, where compensation would be paid, if the City wanted to destroy the house.

Lastly, the basic principles used by the Kansas Court of Appeals to reach the decision it did are precisely the same as those stated in one of the dissenting opinions in *Lucas*.

The Kansas Court of Appeals recited the general rule that "The constitutionality of a statute is presumed," and applied its previous holding from the *Busch* case referred to above regarding the City's police powers.

Likewise, Justice Blackmun in his dissent in *Lucas* states that "The decision rested on two premises that until today were unassailable -- that the State has the power to prevent any use of property it finds to be harmful to its citizens, and that a state statute is entitled to presumption of constitutionality," *Lucas*, supra, at S.Ct. 2905 (Blackmun, J., dissenting)

Because the Kansas Court of Appeals decision and the denial of review by the Kansas Supreme Court occurred before the *Lucas* opinion was rendered, *Lucas* should have retroactive application to the present case.

IX. Conclusion.

This Court should grant this petition for the reason that the Memorandum Opinion of the Kansas Court of Appeals is in conflict with previous opinions of this Court. This petition should also be granted because of its degree of importance as an issue to the public.

Appendix A

ARTICLE 5. DANGEROUS AND UNFIT STRUCTURES

8-501. PURPOSE. The governing body has found that there exit within the corporate limits of the city structures which are unfit for human use or habitation because of dilapidation, defect increasing the hazards of fire or accidents, structural defects or other conditions which render such structures unsafe, unsanitary or otherwise inimical to the general welfare of the city, or conditions which provide a general blight upon the neighborhood or surrounding properties. It is hereby deemed necessary by the governing body to require or cause the repair, closing, or demolition or removal of such structures as provided in this article. (K.S.A. 12-1751; Code 1985)

8-502. DEFINITIONS. For the purpose of this article, the following words and terms shall have the following meanings: (a) Structure shall include any building, wall, superstructure or other structure which requires location on the ground, or is attached to something having allocation on the ground, or is attached to something having allocation on the ground.

(b) Public Officer means the city fire chief or his or her authorized representative (K.S.A. 12-1750; Code 1985)

8-503. PUBLIC OFFICER; DUTIES. The public officer is hereby authorized to exercise such powers as may be necessary to carry out the purpose of this article, including the following:

(a) Inspect any structure which appears to be unsafe, dangerous or unfit for human habitation;

(b) Have authority to enter upon premises at reasonable hours for the purpose of making such inspections. Entry shall be made so as to cause the least possible inconvenience to any person in possession of the structure. If entry is denied, the public officer may seek an order for this purpose from a court of competent jurisdiction;

(c) Report all structures which he or she believes to be dangerous, unsafe or unfit for human habitation to the governing body;

(d) Receive petitions as provided in this article (C.O. 1971, 4-703; Code 1985)

8-504. PROCEDURE; PETITION. Whenever a petition is filed with the public officer by at least five residents charging that any structure is dangerous, unsafe or unfit for human habitation, or whenever it appears to the public officer on his or her own motion that any structure is dangerous, unsafe or unfit for human habitation, he or she shall, if his or her preliminary investigation discloses a basis for such charges, report such findings to the governing body. (Code 1985)

8-505. SAME; NOTICE. The governing body upon receiving a report as provided in section 8-504 shall by resolution fix a time and place at which the owner, the owner's agent, any lienholder of records and any occupant of the structure may appear and show cause why the structure should not be condemned and ordered repaired or demolished. (K.S.A. 12-1752; C.O. 1971, 4-704; Code 1985)

8-506. SAME; PUBLICATION. (a) The resolution shall be published once each week for two consecutive weeks on the same day of each week. At least 30 days shall elapse between the last publication and the date set for the hearing.

(b) A copy of the resolution shall be mailed by certified mail within three days after its first publication to each owner, agent, lienholder an occupant at the last known place of resident and shall be marked " deliver to addressee only." (K.S.A. 12-1752; C.O. 1971, 4-704; Code 1985)

8-507. SAME; HEARING, ORDER. (a) If, after notice and hearing, the governing body determines that the structures under consideration is dangerous, unsafe or unfit for human use or habitation, it shall state in writing its findings of fact in support of such determination and shall cause to be served upon the owner or agent an order directing such owner to either repair or demolish or remove the structure.

(b) If the repair, alteration, or improvement of the structure can be made at a cost which shall not exceed 50 percent of the fair market value of the structure, the owner of the property shall,

within the time specified in the order, repair, alter or improve the structure to render it safe and fit for human use or habitation, or shall vacate and close the structure until such time as he has complied with the order.

(c) If the repair, alteration or improvement of the structure cannot be made at a cost of 50 percent or less of its fair market value, the owner shall, within the time specified in the order, remove or demolish the structure. (C.O. 1971, 4-702, 4-704; Code 1985)

8-508. DUTY OF OWNER. Whenever any structure within the city shall be found to be dangerous, unsafe or unfit for human use or habitation, it shall be the duty and obligation of the owner of the property to render the same secure and safe or to remove the same. (C.O. 1971, 4-701; Code 1985)

8-509. SAME; FAILURE TO COMPLY. (a) If, within the time specified in the order, the owner fails to comply with the order to repair, alter improve or vacate the structure, the public officer may cause the structure to be repaired, altered, improved, or to be vacated and closed.

(b) If, within the time specified in the order the owner fails to comply with the order to remove or demolish the structure, the public officer may cause the structure to be removed and demolished. (C.O. 1971, 4-701, 4-705; Code 1985)

8-510. SAME; MAKE SITE SAFE. Upon removal of any structure, the owner shall fill any basement or other excavation located upon the premises and take any other action necessary to leave the premises in a safe condition. If the owner fails to take such action, the public officer may proceed to make the site safe. (C.O. 1971, 4-701, 4-705; Code 1985

8-511. ASSESSMENT OF COSTS. (a) The cost to the city of any repairs, alterations, improvements, vacating, removal or demolition by the public officer, including making the site safe, shall be reported to the city clerk.

(b) The city clerk may sell any salvage from the structure and apply the proceeds or any necessary portion therof to pay the cost of removing the structure and making the site safe. Any

proceeds in excess of that required to recover the costs shall be paid to the owner of the premises upon which the structure was located.

(c) If the prceeds of the sale of salvage is insufficient to recover the cost, or if there is no salvage, the city clerk shall, at the time of certifying other city taxes, certify the unpaid portion of the costs to the county clerk who shall extend the same on the tax roll of the county. (K.S.A. 12-1756; C.O. 1971; Code 1985)

8-512. IMMEDIATE HAZARD. When in the opinion of the governing body any structure is in such condition as the constitute an immediate hazard requiring public officer to erect barricades or cause the property to be vacated, taken down, repaired, shored or otherwise made safe without delay. Such action may be taken without prior notice to or hearing of the owners, agents, lienholders and occupants. The cost of any action under this section shall be assessed against the property as provided in section 8-511. (C.O. 1971, 4-706; Code 1985)

8-513. APPEALS FROM ORDER. Any person affected by an order issued by the governing body under this article may, within 30 days following service of the order, petition the district court of the county in which the structure is located for an injunction restraining the public officer from carrying out the provisions of the order pending final disposition of the case. (Code 1985)

Appendix B

RESOLUTION NO. R08-90-07

A RESOLUTION FINDING AND DECLARING A STRUCTURE TO BE A DANGEROUS AND UNFIT STRUCTURE IN VIOLATION OF CHAPTER 8, ARTICLE 5 OF THE CODE OF THE CITY OF BALDWIN, KANSAS 1985 AND ORDERING THE DEMOLITION AND REMOVAL OF THE STRUCTURE.

WHEREAS, the public officer has inspected the following described premises commonly known and legally described as:

Lot 138 less the North 80 feet; Lot 141 less the North 80 feet;
Lot 143 less the North 80 feet, on Dearborn Street, in Baldwin City, in Douglas County.

Owner: EUGENE BROWN SR.
ROUTE #1- BOX #249
LAWRENCE, KANSAS 66044

and said public officer has reported to the council on the condition of said premises; and

WHEREAS, the governing body upon receipt of said report did cause a hearing to be held in accordance with Chapter 8, Article 5 of the Code of the City of Baldwin City, Kansas 1985; said hearing having been held on at the time prescribed in Resolution No. RO4-90-02; and

WHEREAS, the governing body did at that hearing make the following findings: That the hearing should be continued to July 9, 1990, subsequently continue to July 23, 1990, and at that hearing the following conditions were noted: That the house is ordered condemned, and demolition and removal commenced by the owner within thirty (30) days of the publication of this resolution or the City will so do and assess the costs to the owner pursuant to Section 8-511 of the Code of the City of Baldwin City.

NOW, THEREFORE BE IT RESOLVED BY THE GOVERNING BODY OF THE CITY OF BALDWIN CITY, KANSAS:

SECTION ONE: The governing body of the Ciy of Baldwin City, Kansas finds the house on the above described premises to be an unfit structure and orders that: The house is condemned, and demolition and removal commenced by the owner within thirty (30) days of the publication of this resolution or the City will so do and assess the costs to the owner pursuant to Section 8-511 of the Code of the City of Baldwin City.

SECTION TWO: The premises shall be left in a safe manner as deemed acceptable by the public officer.

SECTION THREE: That if the owner fails to remove said unfit structure within thirty (30) days of passage of this resolution, the public officer shall cause the structure to be removed and demolished and costs recovered in accordance with Sections 8-509 through 8-511 of the Code of the City of Baldwin City, Kansas 1985.

SECTION FOUR: That a copy of this resolution shall be published in the official city newspaper and shall be served upon the owner by certified mail.

IT IS SO RESOLVED.

PASSED AND APPROVED BY THE GOVERNING BODY OF THE CITY OF BALDWIN CITY, KANSAS ON THE 27TH DAY OF AUGUST 1990.

ATTEST:

Loren Litteer, Mayor

Linda Clark, City Clerk

Approved As To Form:

Jack A. Murphy, City Attorney

Appendix C

Feb 25,1991

90C 911- Eugene Brown, Sr. and Elizabeth Browns v. City of Baldwin City

MEMORANDUM DECISION

This is an appeal by Eugene Brown, Sr. and Elizabeth Brown (Plaintiffs) from a finding by the City of Baldwin, Kansas (Defendant) that a house owned by the plaintiffs and located at 319 E. 11th Street in Baldwin was an unfit structure and ordering the house condemned and removed. The scope of review is that authorized by K.S.A. 1990 Supp. 60-2101(d). The standard of review is limited to deciding if the governing body acted fraudulently, arbitrarily or capriciously and within the scope of its authority and was the order of the governing body supported by substantial competent evidence. *Kansas Board of Healing Arts v. Foote*, 200 Kan. 447, 450, 436 P.2d 828 (1968)

The order for condemnation and removal was made pursuant to Chapter 8, Article 5 of the Code of the City of Baldwin and the plaintiffs admit that the Defendants complied with the code requirements and the plaintiffs did not make the required repairs within the time prescribed by the Code.

The Taking Issue

The plaintiffs raised a legal issue as to whether enforcement against them of section 8-507(c) of the Baldwin City Code constituted a taking of their property by the Defendant without just compensation in violation of the 5th and 14th Amendments of the U.S. Constitution. That code section provides for the removal or demolition of any structure where its repair, alteration or improvement to make it safe and fit for human use or habitation cannot be made at a cost of 50% or less of its fair market value. Property may be destroyed in the legitimate exercise of the police power of the state and such destruction is not a taking of property for public use. *City of Marysville v. Standard Oil Co.*, 27 F

2d 478 (8th Cir.) *aff'd.*, 279 U.S. 582,73 L.Ed. 856,49 S. Ct. 430 (1928) The forced removal of a dangerous and unfit structure is an exercise of the police power and is not a taking of property for public use. *Busch v. City of Augusta*, 9 Kan. App. 2d 119, 674 p. 2d 1054 (1983). If the structure in question was unsafe or dangerous, the Plaintiff, in requiring its removal, was exercising police powers granted to it and its order did not constitute a taking of the structure for public use. The power granted to the Defendant to cause removal or repair of any property within the city that is unsafe or dangerous comes from K.S.A. 12-1751.

> The governing body of any city shall have power to cause the repair or removal of, or to remove any structure located within the city, which may have become unsafe or dangerous.

If after a hearing the city finds a structure is unsafe or dangerous, the city by resolutions shall direct the structure to be repaired or removed, K.S.A. 12-1753. The city is granted discretion to order any unsafe or dangerous structure removed. It seems reasonable to interpret the statute to allow the City to impose conditions if in the exercise of its discretion it authorized repair instead of removal. I hold that the 50% or less cost of repair requirements is within the authority granted the plaintiff by state law and its exercise of that authority does not constitute a taking of the plaintiff's property without just compensation.

The Dangerous and Unfit Issue

Was the property dangerous or unfit as provided by 8-501 of the Baldwin City Code. The property according to the Baldwin City fire chief and public officer was in such bad repair that it was dangerous and not fit for human habitation. The house was vacant and located on a lot overgrown with weed, undergrowth and small sapplings. The porch of the house and its interior were covered by junk and debris. The porch was in need of extensive repairs because of badly deteriorated roof posts, floor, and understructure. The fireplace chimney had pulled away from the house because of settling of the foundation and was tilting away from the house creating a safety hazard. There were holes through the roof over

the porch and several holes in the main roof. Siding was falling from the house. Windows were in a condition that they could not be opened, and the building foundation needed extensive repairs. The house was not metered for gas and could not be heated, the electric meter and fuse box were located on the outside of the house and were not protected from the weather. There was substantial evidence that the house was dangerous and unfit for human habitation.

The Fair Market Value Issue

What was the fair market value of the structure ordered removed?

The plaintiffs had purchased the property which included the structure and lot in October, 1986, for $6000.00. The plaintiffs knew the property was in bad condition when they purchased it and, in fact, knew it had been in bad condition for the past ten years. In 1989, Douglas County for tax purposes had appraised the property at $26,400.00 with land appraised at $5000.00 and the structure at $21,400.00. The plaintiffs objected to the appraisal and convinced the County Appraiser that the fair market value of the property was the $6000.00 which they had paid for the property. The County Appraiser corrected the appraisal in conformity with the request of the Plaintiffs and showed the land value as $5000.00 and the value of the structure $1000.00. There was substantial competent evidence that the land value was $1000.00.

The Repair Issue

The final question is whether the dangerous and unfit structure could be made safe and fit by repairs costing 50% or less of its fair market value.

After the hearing before the Defendant's governing body, the plaintiffs gave an estimate of repair from William Lovelace, a building contractor in Baldwin, Kansas. The Plaintiffs informed Lovelace that the repair costs could not exceed 50% of the fair market value of the house.

Lovelace presented to the plaintiffs a writen estimate of repairs showing the job description as "1. Bring residence up to code," and

estimated the cost to be $500.00. The estimate was not itemized as to the work to be performed. The Defendant's governing body required that estimates of repair had to be itemized so it could be determined if code requirements were going to be met. Itemization was required as to all property they reviewed for removal. The Plaintiffs would not get an itemized statement and the Defendant would not accept the unitemized statement.

Actually, the statement of repairs presented by Lovelace covered only labor for repair of the porch with materials to be supplied by the Plaintiffs. Lovelace had explained these conditions to the Plaintiffs at the time he submitted the estimate to them. The Plaintiffs were aware that the property could not be repaired to make it habitable for $500.00, but thought it might be "patched" for that amount.

The structure could not be made habitable by repairs costing $500.00 or less. The findings and order of the Defendant was not unlawful, arbitrary or capricious and are supported by substantial evidence. The Plaintiffs' appeal is denied. Costs are assessed to the Plaintiffs.

This memorandum constitutes a journal entry.

James W. Paddock
District Judge

cc: Theodore J Lickteig
Jack Murphy
Court Reporter

Appendix D

NOT DESIGNATED FOR PUBLICATION
No. 66,474

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

EUGENE BROWN, SR. AND ELIZABETH BROWN,
Appellants,

V.

CITY OF BALDWIN CITY, KANSAS,
a Municipal Corporation,
Appellee.

MEMORANDUM OPINION

Appeal from Douglas District Court; JAMES W. PADDOCK, judge. Opinion filed March 20, 1992. Affirmed.

Theodore J. Lickteig, of Lawrence, for appellants.

Todd N. Thompson, of Barber, Emerson, Springer, Zinn & Murray, of Lawrence, and *Jack A. Murphy*, of Baldwin City, for appellee.

Before GERNON, P.J., REES, and RON ROGG, District Judge, assigned.

PER CURIAM: The City of Baldwin City (City) determined that a vacant house owned by Plaintiffs Eugene Brown,Sr. and Elizabeth Brown was a dangerous, unsafe, and unfit structure for human habitation under Baldwin City Code § 8-507 (1990) and ordered it to be condemned. The Browns have appealed from the district court decision affirming the City's determination. We affirm. The Browns purchased the property in question for $6,000.00 in October 1986. The house had not been inhabited for at least seven years; it was in poor condition. After the purchase, the Browns made no improvements or repairs to the house.

The Browns argue that the district court erred in holding the City's action was supported by substantial evidence and was not arbitrary, capricious, or fraudulent. The Browns challenge the findings and conclusion that the house was a dangerous and unfit structure that should be demolished because adequate repair would cost more than 50% of its fair market value.

On the Brown's appeal of the City's decision to the district court, pursuant to K.S.A. 1991 Supp. 60-2101(d), that court's scope of review was limited:

> "'A district court may not appeal, substitute its judgment for that of an administrative tribunal, but is restricted to considering whether, as a matter of law, (1) the tribunal acted fraudulently, arbitrarily or capriciously, (2) the administrative order is substantially supported by evidence, and (3) the tribunal's action was within the scope of its authority.'" *In re Residency Application of Bybee*, 236 Kan. 443, 444, 691 P. 2d 37 (1984) (quoting *Kansas State Board of Healing Arts v. Foote*, 200 Kan. 447,Syl. 1, 436 P. 2d 828 [1968]).

Our scope of review in determining whether the district court observed the requirements and restrictions placed upon it is to make

the same review of the City's action as the district court was to have done. See *Bybee*, 236 Kan. at 445.

In summary, the fire chief's report and testimony established:

1. There were holes through and considerable sagging of the roof.

2. The porch was covered with junk and debris and the porch posts, floor, and understructure were decayed.

3. The siding was missing or decayed and the rim joist and mudsill were rotting.

4. The brick chimney was pulled away about 10 to 12 inches from the top of the house.

5. There was no gas meter and water service was shut off at meter.

6. The windows were not operable.

7. There was electricity in the house, but the meter was located outside without a weather shelter, and the wiring was not in conduit in violation of the City Code.

8. There was no smoke detector in the house.

The Browns did not object to the above findings of fact concerning the condition of the house. They do not assert that the house is safe or fit for human habitation. The Browns have offered no evidence to contradict the evidence describing the deterioration of the house. The evidence was abundantly sufficient to support the City's determination that the house was dangerous and unfit for human habitation.

The Browns argue that the City's reliance on the County Appraiser's valuation of the house was, in itself, unreasonable, arbitrary, and capricious because the Appraiser's office does not inspect all property in the county every year. Nonetheless, the Browns rely on the appraiser's 1991 valuation when urging that the City acted unreasonably.

A Performance Audit Report by the Kansas Department of Revenue, Division of Property Valuation, was completed in June 1991 which, according to the Brown's, revealed inaccuracy and inconsistency in the Appraiser's valuations. We will not take judicial notice of these report; it is not within the record on appeal.

The Brown's testified that they believed the house was worth only $1,000.00 in 1989. They have insisted that their appeal of the Appraiser's considerably higher valuation was "a result of [their] desire to pay lower taxes and not their opinion of the fair market value of the house."

Contrary to the Brown's argument, the City did not rely on only the Appraiser's valuation. The Brown's had purchased the house in 1986 for $6,000.00. They did not make any repairs or improvements on the house after the purchase. The evidence as to the condition of the house is uncontradicted.

The City's finding that the fair market value of the house was $1,000.00 is supported by the evidence and is not arbitrary, capricious, or fraudulent.

The Brown's complain that, by boarding up the house, the City denied them their right to repair the house and that the City had prevented them from having an independent appraisal made. The Browns argue that it was the City's burden to prove that repairs would exceed 50 percent of the value, but the City offered no such evidence. They rely on *West v. City of Borger*, 309 S.W. 2d 250,253 (Tex. Civ. App. 1958).

In *West*, 309 S.W. 2d at 252, the court found that "the repairs the testimony shows were needed as of the day of trial were not such as to amount to a substantial reconstruction." The uncontradicted testimony showed the repairs needed could be made for approximately $3,800 while complete reconstruction would cost approximately $17,000.

In this case, two contractor's estimates were merely for partial repairs. Bill Lovelace's $500.00 estimate covered only labor to fix the porch area, with the Browns to supply the materials. Lovelace

testified that a new roof would cost about $3,000.00. Street Brothers' $1,075.00 estimate included removing the front porch, relocating the fuse box, tightening the porch light, and repairing the roof.

Considering the uncontradicted evidence describing the deteriorated condition of the house, the City had before it sufficient evidence showing that the house could not be repaired for less than 50 percent of its value.

The Browns additionally urge that City Code § 8-507 violates the Fifth Amendment by providing for proscribed taking through over-regulation of private property. We disagree.

K.S.A. 12-1751 states: "The governing body of any city shall have power to cause the repair or removal of, or to remove any structure located within the city, which may have become unsafe or dangerous."

City Code § 8-507, that the Browns contend is unconstitutional, provides:

> "(a) If, after notice and hearing, the governing body determines that the structure under consideration is dangerous, unsafe or unfit for human use or habitation, it shall state in writing its findings of fact in support of such determination and shall cause to be served upon the owner or agent an order directing such owner to either repair or demolish or remove the structure.
>
> "(b) If the repair, alteration, or improvement of the structure can be made at a cost which shall not exceed 50 percent of the fair market value of the structure, the owner of the property shall, within the time specified in the order, repair, alter or improve the structure to render it safe and fit for human use or habitation, or shall vacate and close the structure until such time as he has complied with the order.
>
> "(c) If the repair, alteration or improvement of the structure cannot be made at a cost of 50 percent or less of its fair market value, the owner shall, within the time specified in the order, remove or demolish the structure.

"The constitutionally of a statute is presumed. All doubts must be resolved in favor of its validity, and before the statute may be stricken down it must clearly appear that the statute violates the constitution. *Kaufman v. Kansas Dept. of SRS*, 248 Kan. 951, 956, 811 P. 2d 876 (1991).

The City's exercise of its police power is concerned here, not eminent domain. "'Constitutional provisions against taking private property for public use without just compensation impose no barrier to the proper exercise of the police power.'" *Busch v. City of Augusta*, 9 Kan. App. 2d 119, 127, 674, P. 2d 1054 (1983) (citing 29A C.J.S., Eminent Domain § 6, p. 178).

The Browns contend that the City's order to demolish their house constitutes a taking under the three factors test developed in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S.Ct. 3141 (1987), and *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 57 L. Ed. 2d 631, 98, S.Ct. 2646, *reh. denied* 439 U.S. 883 (1978). The Browns do not allege denial of due process or inadequacy of notice. Their argument is that the City's order deprives them of the opportunity and ability to repair the house and has interfered with their distinct investment-backed expectation with resultant detrimental economic impact.

In *Busch*, 9 Kan. App. 2d at 121, the city of Augusta demolished Busch's building after a fire gutted its interior because the remaining structure constituted an immediate hazard to the public. We held that property may be destroyed as a result of the legitimate exercise of the police power of a state. 9 Kan. App. 2d at 127 (citing *City of Marysville v. Standard Oil Co.*, 27 f. 2d 478 [8th Cir.], aff'd 279 U.S. 582, 73 L. Ed. 856,49 S. Ct. 430 [1928]). The police power is the power which the state inherently has to restrict the use of property without paying compensation by valid regulations intended to promote public health, safety, morals, and the general welfare. *Busch*, 9 Kan. App. 2d at 127, (citing *Riddle v. State Highway Commission*, 184 Kan. 603,612, 339 p. 2d 301 [1959]; *Schaake v. Dolly*, 85 Kan. 598,118, Pac. 80 [1911]; *State ex rel. Carter v. Harper*, 182 Wis. 148, 153, 196 N.W. 451 [1923], 33 A.L.R. 269).

As mentioned, the Browns' house had no smoke detector and the electrical wiring was not properly done; the brick chimney was pulled away from the house. The house had numerous fire and structural deficiencies that amounted to hazards to neighboring houses and any passersby. The City's decision was within the proper exercise of its police power by regulation intended to promote public health and safety. City Code § 8-507 (c) does not authorize action that constitutes a taking in violation of the Fifth Amendment on its face or as applied in this case.

Affirmed.

Appendix E

SUPREME COURT ORDER DISTRICT CASE NO. 90C911

IN THE SUPEREME COURT
OF THE STATE OF KANSAS

THEODORE J LICKTEIG
6900 COLLEGE BLVD SUITE 430
OVERLAND PARK KS 66211

EUGENE BROWN SR., AND
ELIZABETH BROWN, APPELLANTS, NO. 91-66474-AS

CITY OF BALDWIN CITY, KANSAS,
A MUNICIPAL CORPORATION, APPELLEE.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT;

PETITION FOR REVIEW BY APPELLANTS, EUGENE AND ELIZABETH BROWN. DENIED.

DATE: 06/03/92.

CAROL G. GREEN
CLERK